

¶1 Christina Hanlon was convicted after a jury trial of reckless child abuse and aggravated driving under the influence of intoxicating liquor or drugs (DUI) with a minor present. On appeal, Hanlon contends the trial court erred in denying her motion to dismiss because she was deprived of her right to counsel before taking a preliminary breath test. We affirm for the reasons set forth below.

Factual and Procedural Background

¶2 While driving to work in his personal vehicle on July 4, 2008, Tucson Police Officer Placencia noticed that a car driven by Hanlon was “weaving in the roadway.” He requested assistance from a marked police car and Officer Marine met him in front of Hanlon’s residence. Marine made contact with Hanlon and noticed that she had “a moderate odor of intoxication, slurred speech, watery, bloodshot eyes, [and] a slight sway as she stood.” Marine asked Hanlon to complete two field sobriety tests, informed her of her rights pursuant to *Miranda*,¹ and asked if she would answer his questions. Hanlon declined to answer any questions and, after consulting with Placencia, Marine arrested her for DUI.

¶3 Marine advised Hanlon of the implied consent law² and asked her to take a preliminary breath test. Hanlon initially refused to take the breath test and asked to speak

¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

²A driver in Arizona implicitly consents to “tests of the person’s blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content if the person is arrested for any offense arising out of [certain] acts . . . committed . . . while the person was driving or in actual physical control of a motor vehicle.” A.R.S. § 28-1321(A). Failure to consent to such a test results in the automatic suspension of the driver’s license. § 28-1321(B).

with an attorney. Marine restated the consequences of refusing to take the test and told Hanlon she would be taken to the police station where a breath test would be administered. As he began to handcuff her, Hanlon stated that she did not need to talk to an attorney and would take the test. Marine then informed her that he was unable to administer the test at the scene and said she could contact an attorney at the police station.

¶4 When they arrived at the police station, Marine offered Hanlon the opportunity to telephone an attorney; she declined the offer and agreed to submit a breath sample. After taking the breathalyzer test, Hanlon again was provided access to a telephone. Although she made telephone calls, none were to an attorney. Following a jury trial, Hanlon was convicted as noted above. The trial court suspended imposition of sentence and placed her on probation for five years. This timely appeal followed.

Discussion

¶5 The sole issue on appeal is whether Hanlon was deprived of her right to counsel before taking the breath test. She contends she was not given the opportunity to contact an attorney before taking the test and claims Marine “dissuad[ed] her from refusing the breath tests or contacting counsel.” Based on the evidence introduced at the hearing on the motion to dismiss, the trial court found that, “[w]hen [Hanlon] said she wanted an attorney, [Marine] told her that she had the right to talk to an attorney” and that “as soon as [t]he[y] got to the station, that that would happen. And he repeated it once they got there.” The court therefore concluded Hanlon “was provided the right to talk to an attorney prior to the test” and denied the motion to dismiss.

¶6 “Motions to dismiss are committed to the sound discretion of the trial court, and we will not disturb the denial of such a motion absent an abuse of the court’s discretion.” *State v. Chavez*, 208 Ariz. 606, ¶ 2, 96 P.3d 1093, 1094 (App. 2004). “We view the facts and evidence in the light most favorable to sustaining the trial court’s ruling, but we review questions of law de novo.” *Id.*

¶7 “Arizona courts have established the rule that someone accused of DUI has the right to assistance of counsel in determining whether to submit to a breathalyzer test as long as speaking to counsel does not interfere with the investigation.” *State v. Transon*, 186 Ariz. 482, 484, 924 P.2d 486, 488 (App. 1996); *see also State v. Juarez*, 161 Ariz. 76, 81, 775 P.2d 1140, 1145 (1989); Ariz. R. Crim. P. 6.1 (general right to counsel). Here, both Hanlon and Marine testified that, after Hanlon’s initial request to speak to an attorney, Marine had told her she would be able to contact an attorney when they arrived at the police station. And, Marine testified that, when they got to the station, he again expressly provided her the opportunity to telephone an attorney before he administered the breathalyzer test. Although Hanlon disputed Marine’s testimony during the hearing, the court concluded Marine was the more credible witness, and we will not second-guess that determination on appeal. *Cf. State v. Fierro*, 220 Ariz. 337, ¶ 9, 206 P.3d 786, 788 (App. 2008).

¶8 Hanlon nevertheless asserts that Marine “offered no sufficient justification for failing to allow a call [to Hanlon’s attorney] at the scene, nor did he offer any testimony that it would unduly impede the investigation” for her to telephone an attorney before they arrived at the police station. Generally, when a suspect is not provided an

opportunity to contact counsel, the burden is on the state to demonstrate that contacting an attorney would have been disruptive to the investigation. *Juarez*, 161 Ariz. at 81, 775 P.2d at 1145. However, there was ample evidence to support the trial court's conclusion that Hanlon had been provided an opportunity to contact a lawyer before taking the breath test. This is all the law requires. Hanlon has not cited, nor have we found, any authority suggesting the delay between the time of her initial request to call an attorney and the time she was given the opportunity at the police station before taking the test constituted interference with her right to counsel. *See id.*; *Transon*, 186 Ariz. at 484, 924 P.2d at 488.

¶9 We also cannot say the trial court abused its discretion in concluding that Hanlon voluntarily withdrew her request to speak with counsel before the breathalyzer test was administered. Waiver of the right to counsel must be voluntary, Rule 6.1(c), and a suspect must not be “threatened, tricked, or cajoled into a waiver” of that right, *Miranda v. Arizona*, 384 U.S. 436, 476 (1966). ““Coercive police activity is a necessary predicate to the finding that a [waiver of rights] is not “voluntary.””” *State v. Smith*, 193 Ariz. 452, ¶ 14, 974 P.2d 431, 436 (1999) (assessing voluntariness of confessions), *quoting Colorado v. Connelly*, 479 U.S. 157, 167 (1986). And we review the court's determination on the issue of voluntary waiver of the right for an abuse of discretion. *See State v. Gay*, 214 Ariz. 214, ¶ 30, 150 P.3d 787, 796 (App. 2007) (appellate court reviews for abuse of discretion determination whether defendant's waiver knowing, intelligent, and voluntary).

¶10 At the hearing, Marine testified that, after he had arrested Hanlon and advised her of the implied consent law, Hanlon refused to take the test and stated she wanted to speak with an attorney. Marine then informed her again of the consequences of refusing to submit to the breathalyzer test:

I advised her of the consequences of a refusal. I advised her that her license would be suspended for a year. This is in addition to what I read on the implied consent affidavit. And I advised her that it was possible that her refusal could be used against her in Court. And then I told her she needed to go to the station and take a breath test[,] and I started to put the handcuffs on her.

Hanlon responded by saying she would take the test and no longer needed to speak to an attorney. Concerned that Hanlon's withdrawal of her request to speak with counsel was prompted by being handcuffed, Marine then clarified:

I said no, this isn't a punishment for you saying you wanted to talk to an attorney. This is because we have to go to the police station to take the test, [and] you have to be handcuffed in the back of the [police] car. And I didn't have a problem with her contacting an attorney when we got to the station.

However, once they arrived at the police station, Hanlon expressly declined Marine's offer to contact counsel and consented to the test.

¶11 Hanlon similarly testified that, after she had requested an attorney, Marine "basically just t[old] me that I could lose my license, that there is a possibility of this or that and that I do have to go down to the station and do a breath[a]lyzer." She stated she changed her mind about speaking to an attorney

[b]ecause he . . . made me feel that, he was kind of trying to talk me out of it by saying, well, if you just go down and you

just do this test, . . . I can be picked up by my boyfriend with my son in about an hour or two and . . . that would be settled.

And so I changed my mind and I was like, fine, whatever, I will just go ahead and do what you guys want me to do so we can end this.

The trial court concluded that, when Hanlon at first told Marine she would not take the test, he

explained to her the consequences of the decision not to participate in the test. And it's at that point that she said, never mind, I don't need to talk to an attorney, I will just go ahead and take the test. And the testimony of the officer is at that point he explained to her again, I'm not penalizing you because you want to talk to an attorney, you still have the right to talk to an attorney. The thing is I have to administer the test, I have to put you under arrest to [transport] you down [to] the test And if you want to talk to an attorney when you get . . . to the station, you can do so.

¶12 The trial court also noted that Marine again had informed Hanlon of her right to speak with an attorney when they arrived at the station, and the court concluded, based on Hanlon's response, that she voluntarily had changed her mind. The record supports the trial court's findings that, after Hanlon asked to speak with an attorney, Marine did not pressure her to abandon that request. Rather, he merely restated the consequences of refusing to take the breath test and explained that Hanlon's arrest and transportation to the police station were unrelated to her request for counsel. Upon arriving at the station, Marine offered, and Hanlon declined, the opportunity to contact an attorney. Under these circumstances, we cannot say the court abused its discretion in concluding Hanlon voluntarily waived her right to consult counsel in advance of the breathalyzer test. *Id.*

Disposition

¶13 For the reasons stated above, we affirm Hanlon's convictions and probationary term.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge